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The Road to the Virtual Courtroom? A Consideration of Today's--and Tomorrow's--High-Technology Courtrooms

Jack B. Lederer
William & Mary Law School

"I CAN'T BELIEVE I ASKED THAT QUESTION": A LOOK AT CROSS-EXAMINATION TECHNIQUES

JACK B. SWERLING*

I. INTRODUCTION

Cross-examination is the heart and soul of a criminal trial. It has been described as the true vehicle in the search for truth in the courtroom.[1] Observing a great cross-examination is spellbinding. Performing an effective cross-examination is exhilarating. Making unnecessary and careless mistakes on cross-examination can be a disaster.

How does one become an effective cross-examiner? The core element to an effective cross-examination is preparation, coupled with as much practical experience as possible. Experience can be gained only by trying cases which will give the lawyer an opportunity to develop an effective style through trial and error.

Some people are born with natural gifts, such as a great voice or presence, that aide them in being effective cross-examiners. However, for the most part, lawyers find that cross-examination is a learned process; what works for one lawyer is what that lawyer finds comfortable.

Cross-examination is the lawyer's surgical tool that will assist him in weakening an adversary's position or advancing his own cause. Cross-examination ensures that it is not sufficient for a witness simply to accuse, deny, draw a conclusion, or describe an event. The witness is subjected to cross-examination to test his credibility, perception, recollection, and the consistency of his assertions. Only after being subjected to the test of cross-examination will a jury possess enough information to believe in whole or in part, or reject in whole or in part, the witness's testimony.

This Article is written with the hope that it will be useful to both prosecutors and defense lawyers as the fundamentals of cross-examination are equally applicable to any advocate. Because I have always been on the defense side of the courtroom, I draw examples from my own experience.

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* Jack B. Swerling is a 1973 graduate of the University of South Carolina School of Law. He has written several books and articles on criminal trial and appellate practice. He is a Fellow of the American College of Trial Lawyers, the American Academy of Appellate Lawyers, and the American Board of Criminal Trial Lawyers.

Portions of this Article appeared as a chapter by Jack Swerling on Cross-Examination in the South Carolina Bar's 1998 *South Carolina Criminal Trial Techniques Handbook*. The South Carolina Bar has granted permission to have those portions republished here.

1. *See* FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 7 (4th ed. 1948).

II. CASE INTEGRATION AND CROSS-EXAMINATION

Do not look at cross-examination in a vacuum. Cross-examination must be part of the entire case development, not isolated from it. The overall strategy should drive the cross-examination, and the cross-examination should further the overall strategy.

Before developing a strategy, you should identify a clear theory and goal. Let us examine a homicide case from the defense perspective. Assume that the defendant shot someone during an argument. Although there are good issues of self-defense, they do not seem strong enough for an outright acquittal. The State has not offered an acceptable plea, and the case is proceeding to trial. What is the goal? A conviction for murder is not an acceptable option. An acquittal may be an option, but not very likely. A conviction for manslaughter is not wanted, but is acceptable. The most sensible theory to adopt is a plea of self-defense. At best the defendant gains an acquittal and, at the worst, hopefully no more than a conviction for manslaughter.

Once you have identified a theory and goal, develop a strategy. Make a list of what you would like to accomplish at each stage of the trial to support the theory and accomplish the goal. The discovery and investigation will indicate what the State will present and what you will have to offer. Even with a good overall strategy, be flexible by having alternate plans, contingent plans, and just good old common sense. A trial lawyer should never approach a case with a rigid plan.

Preparation is the essential component in achieving the goal and developing the strategy. In the preparation of a case, develop your case-in-chief to further the theory of the case, but always prepare the cross-examination not only to further the theory, but also to undermine your opponent's theory.

During the opening statement set out the major theory that has been developed, but do not reveal everything. Save some surprises. In our hypothetical situation, open with the one theory on which you cannot lose—self-defense. Now is not the time for the defense to suggest manslaughter or to try and keep any other options open. Focus on self-defense. Do not concede anything less than total victory. You must communicate total confidence in your case. Do not make promises that may be impossible to keep, such as stating "the defendant will testify," unless you are *sure* that he will testify. Lay out what you *know* you can show in your case-in-chief. Plant seeds for your cross-examination. If there is an accomplice or a co-defendant who is testifying for some consideration, prepare the jury for your cross-examination as to the motive, interest, and bias of the witness. If the victim was less than pleasant, prepare the jury for cross-examination as to reputation, prior difficulties, or threats. The opening statement is a great coming attraction for the trial. If the coming attractions at the movies interest you, you will want to see the movie. Lastly, use the opening statement to set the stage for your overall direct and cross-examination strategy and theory.

During the State's case, the cross-examination should be designed to

further the defense theory of the case, to discredit the State's theory of the case, and to plant seeds that will either be material and grow in the defense case or come together in the closing argument.

During the defendant's case, enlarge on and further the issues made during cross-examination. If the evidence included prior difficulties between the parties, call witnesses to corroborate these difficulties. If the evidence presented included prior threats by the victim, call the witnesses who heard them. The key is not only to present the case you have prepared, but to corroborate the issues raised by cross-examination. Try not to let any issue go unanswered unless, of course, an answer hurts.

If everything has gone as planned, the case can be tied together in closing argument. This is the time to bring together the pieces of evidence that support your theory of the case or weaken and create reasonable doubt in the State's case. Point out the State's failure to live up to promises made in the opening. Highlight the issues the defense said would be important. Attack the State's case-in-chief with the high points of the cross-examination and weave them together with the strengths of the defense case. If you planted a seed that was not obvious, now is the time to highlight it. For example, draw attention to a subtle inconsistency or error that crushes the State's theory of the case. Because the evidence is now closed, the State cannot correct any problem.

Last but not least, develop the jury instructions to follow the theory of the case and the methods by which the jury can and should weigh the testimony. Request appropriate charges on impeachment, prior inconsistent statements, credibility, and accomplice testimony.

The prosecution has a more difficult task in attempting to integrate the case. For one thing, the prosecutor can easily lay out, and should lay out, the State's theory of the case in the opening, but he must use discretion in anticipating what the defense will offer. On the one hand, if the State anticipates a defense, the defense can adjust to another strategy. On the other hand, there may be legal pitfalls in setting out what an anticipated defense may be because the defense has no burden to offer a defense at all.

During the State's presentation of the case-in-chief, what theory and strategy the defense is pursuing will become readily apparent by the questions asked. The prosecutor may adjust the presentation of evidence accordingly or may choose to stay with the case already mapped out.

A well-prepared prosecutor should be able to anticipate and prepare for the cross-examination of the defendant and any defense witnesses. However, due to the limitations in discovery, the prosecutor may be confronted with unknown witnesses. Of course the prosecutor will seek to discredit the witnesses by pointing out motive, bias, prejudice, or inconsistencies, but the prosecutor must be alert to the possibility that he may discover evidence corroborating the defendant's theory during the cross-examination.

The greatest benefit and advantage the State has in cross-examination of the defense witnesses is to lay a foundation for reply testimony. Any number of issues may be raised during the direct and cross-examination of the defense

witnesses, and the State has the last word on impeaching or contradicting a witness on a material matter. The prosecutor should carefully plan questions on cross-examination which are designed to elicit responses that can be contradicted in reply. Likewise, the State has the same opportunity in closing to bring together its theory of the case and has the additional advantage of having the last word after the defense presents its argument.

The one thread that runs from the beginning of a case to the final instructions is the cross-examination. In order to have an effective cross-examination and a favorable outcome, the case must be integrated.

III. PRETRIAL PREPARATION FOR CROSS-EXAMINATION

Every experienced lawyer will say that the secret to an effective cross-examination is preparation. While the statement may be overused, it cannot be overemphasized. Few people can consistently deliver an effective cross-examination without extensive preparation, although some are naturally gifted to seize the moment. A lawyer may get lucky from time to time, but the true advocate knows the hard work that goes into the preparation of a case, especially in preparing an effective attack on your adversary's case-in-chief.

Gathering information is the key to outlining a cross-examination. To develop a cross-examination, the lawyer needs everything available on an issue, including information that is not always readily available. Defense counsel should conduct an extensive interview of the defendant, her friends, and her family. Learn everything you can about the defendant and about how she became involved in the dilemma. Know her strengths, weaknesses, positive traits, and shortcomings. Learn what she does, how she lives, and how she thinks. What does she know about the case? What are her perspectives? What has been said to her by witnesses or by law enforcement? What was her relationship to the victim?

The prosecution and defense should discover and interview witnesses favorable to their respective case. Favorable witnesses are not only those that enhance your case but also those that hurt the opposition. These latter witnesses may get called by the other side, and you will have them on cross-examination. There is no better or more effective way to win a point than to bring it out on cross-examination of your opponent's witness.

Interview any unfavorable witnesses, too. Interviewing these witnesses will enable you to know not only what questions to ask, but also what questions to avoid. It will assist you in knowing what can hurt your opponent's case and what can help yours. It also helps to know what is coming and how to prepare for it. The only time I choose not to interview a witness from the other side is when I do not want to educate that witness or the opposition of my theory or strategy, or when I know it would be fruitless or unkind, such as to interview a homicide victim's family.

If there is a corresponding civil case, obtain all the pleadings and depositions. Verified pleadings can be a great source of prior inconsistent

statements. In a murder case I tried, the former wife of the victim took the stand in reply and testified what a peaceful man the victim was. On cross-examination I was able to point out that she had sued the victim for physical cruelty as a result of his violent and abusive behavior, which she alleged in a verified complaint in a divorce case. Depositions and prior trial transcripts are likewise a great source for impeachment material. Rare is the occasion that people will be entirely consistent every time they tell the story. A minor variation can become a major issue.

Investigate all aspects of the case. In a homicide case, determine what the victim was doing before she got to the scene of the fatal encounter, and what her reputation for turbulence, violence, or carrying a weapon was. Interview the police officers, the emergency medical personnel, and the hospital personnel. Interview all eyewitnesses. The prosecution should examine similar questions for a defendant or any of the known defense witnesses.

Obtain all investigative reports, investigative notes, and statements of witnesses. Read them, highlight them, outline them, and categorize them. Start thinking of how one report or statement supports or contradicts another. If you discover one supporting another or one contradicting another, build on it. You want every statement made by a witness, including every note made about what that witness said. Cross-examination is your weapon.

Obtain all forensic reports and interview any experts. What are the strengths and weaknesses of the findings? What will be fertile for cross-examination, and what should you avoid? Doing this well in advance of trial allows you time to prepare yourself on the subject through your own reading or through an expert of your own choosing.

Do not stop with what the other side is supposed to give you in discovery. You can find valuable information for cross-examination in school records, highway department records, employment records, courthouse records, tax returns, business records, bank records, phone records, pager records, medical records, newspapers, military records, rap sheets, or prison records. The list of potential sources is as large as your imagination.

Examine the physical evidence in the case. View photographs and visit the scene. Inevitably you will spot a key fact that will assist in your cross-examination, such as the presence or absence of blood stains or tears on clothing. Look for the presence or absence of weapons, cuts, bruises, and wounds evidenced in photographs. Examine distances, structures, and terrain at the scene. A lawyer can neither cross-examine someone about the scene of a homicide without knowing whether something was unique to the area, nor seek to cross-examine a forensic expert without knowing the condition of clothes or the location of wounds.

In a homicide case, obtain the autopsy and interview the pathologist. Know what she will say and why. Go over the cause of death, angles, powder burns, offensive and defensive wounds, and positions of both the victim and assailant. Find out which wounds were fatal or disabling and which were not. Review the alcohol or drug levels and their potential effects, such as impaired

judgment or aggression.

The defense should never waive a hearing, whether it be a preliminary hearing or a motions hearing. Anytime either side can get someone under oath, there is fertile ground for later impeachment. Pin down the good and bad points, but most of all look to the future for impeachment opportunities. Have every hearing recorded and obtain a transcript. Also order transcripts of any relevant hearings, motions, pleas, sentencings, trials, depositions, interviews, tape recordings, and videos.

The key to cross-examination is information and the ability to use it effectively. The information is out there and is usually free—just issue a subpoena. By gathering the necessary information, you will know what pitfalls to avoid. There are few better feelings in a trial than when you actually know what is coming from the witness stand (both on direct and, especially, on cross-examination) that will be favorable to your side.

IV. TRIAL PREPARATION OF CROSS-EXAMINATION

You now have your theory, a strategy, and a wealth of information. However, unless the information is organized efficiently and readily accessible, it cannot be used effectively. There are many methods of organizing the information, and in many situations a combination of two or more is practical.

A. The Working File

The methods described in this Part, which are applicable to both the prosecution and defense, are very helpful in tracking and organizing information as it is gathered.

First is the topical method. This method allows you to have at your disposal all the information on a given subject. The idea is to funnel all the information into one part of the file. For example, break the file down into subparts, each housing an important issue. Among these could be forensics, reputation, prior difficulties, prior threats, other acts, impeachment, the day of the event, the day before, or the day after. For each case, there would be a number of different topics. This gives you a central source for all information on a subject. You will not have to search through the entire case file trying to find a witness or subject.

Second, because many cases involve a number of different dates and events, I find it very helpful to keep track of these separately to keep them all in one place. For example, if February 10, 1993 is an important date in the case, all relevant information for that date should be indexed and kept together. What each witness says and what each document reveals about that date or event is in one location to access for cross-examination. Inevitably, you will obtain conflicting information which will provide a great source of cross-examination material.

Next, you should keep a separate folder for each witness. Put everything

related to a witness in one folder, including statements, incident reports, lab reports, rap sheets, and biographical information. You should also put in a particular witness's folder any cross-reference to that witness by another witness. A similar procedure can be followed for each count of an indictment.

In addition there should be a file for all important documents, such as statements that will have to be referred to during examination or will have to be introduced into evidence as an exhibit. Having one location for these documents, even if copies are kept in other folders, is very important because it allows more complete access.

Finally, you should create a file for every exhibit, noting who will present the exhibit, the relevancy of the exhibit, and the order of presentation.

Obviously there will be a great deal of duplication by utilizing these methods, but it will enable you to access immediately an item when you need it.

B. Organization for the Trial: the Trial File

After completing your working file, you should organize the material for the actual trial. There are many approaches, and no single approach works for everybody or all the time. I have utilized each of the following methods or a combination of them. Depending on the case, the amount of information available, and sometimes on sheer whim, I designate one of the methods and then sometimes change before trial. The object is to condense your working file into a user-friendly trial file.

My favorite method is to use a notebook with a topical numbered index (for example, 1-50). Each numbered section of the notebook is devoted to a witness, an issue, a subject, a date, or an exhibit. Put everything related to the subject under its respective section of the notebook. Also, put it under the notebook tab in an organized fashion, such as using a sub-index under each tab (for example, A-Z). By doing so, when you turn to a numbered tab from the main index you have another index showing what is contained under that tab. Documents may need to be put under more than one tab. For example, a South Carolina Law Enforcement Division report can be under both forensics and the name of the lab expert, or an investigative report can be under either the name of the investigator, the witness, or an issue.

Another method is file folders. In preparation for trial, a working file folder should be condensed into something more manageable. The organization of a trial file by folder will be much the same as the notebook, having appropriate indexes and sub-indexes. The ultimate goal is organization and accessibility. Even if the notebook method is used, I suggest a series of file folders separately marked with documents ready for use in cross-examination, including statements, transcripts, depositions, and records. Each document should be a clean copy ready for cross-examination and ready to be admitted into evidence.

C. Structure for Cross-Examination

The next step is to set up notes or an outline for a cross-examination. By following the procedures outlined earlier in this Article, you will have a lot of information, such as several statements of witnesses, some physical evidence, and a few witnesses or documents standing in reserve for impeachment. To put it all together, I suggest notebook paper or index cards.

One method is to dissect line-by-line a written statement, a summary of an oral statement, an investigative report, or a transcript. You should leave adequate space between the lines to put additional lines from *other* statements on the same issue, handwritten thoughts, or notes from direct examination. Every line should be designated with the appropriate source, such as "Statement of February 13, 1996" or "Grand Jury testimony May 6, 1996" (prepare a ledger for brevity: Stmt. of 2/13/96 or GJ 5/6/96). When cross-examining the witness, the lawyer easily can reference contradictory statements. The following is an example of one statement and Grand Jury testimony containing conflicting information:

> *Al Jones*
>
> Stmt. of 2/13/96 - "On January 3, 1994, George delivered to me a kilo of cocaine."
>
> GJ of 5/6/96 - "On January 3, 1994, Richard brought me a kilo of cocaine and left it with Allan for me."

A variation of this method is to divide the various statements line by line, leaving space between the lines, but have each statement on a separate page rather than integrated with each other.

Another method is to utilize a paragraph form instead of single sentences. Just make sure to include only one issue per paragraph. Do not get lost in the information you have gathered. Separate it and organize it.

A third method is the issue method. Divide the information available on a witness and catalogue it by assigning each issue a separate page or card. For example:

> *Al Jones*
>
> 1. Plea Bargain
> 2. Sentence Exposure
> 3. Prior Record
> 4. Events of June 12, 1994
>
> Events of January 6, 1995
>
> Events of March 7, 1995
>
> 5. Relationship with Dennis
>
> Relationship with Rachel
>
> 6. Chicago
>
> Atlanta

For each issue include all the relevant information you have gathered. For example, the page dealing with the "Events of June 12, 1994" issue might include the following information:

Al Jones (Witness)
"June 12, 1994" (Event)

Stmt. of 2/13/96—"On June 12, 1994, I was in Chicago."
GJ of 5/6/96—"On June 12, 1994, I was in Atlanta."

The idea is to have at your disposal everything a witness has said about a particular issue, so you can be ready to examine him with it.

A final method I have utilized is the column method. At the top of each page, I put the document to which I am referring, and in the left-hand portion, I indicate the issue (for example, as to witness Al Jones):

WITNESS - AL JONES

Issue	Stmt. of 2/13/96	GJ of 5/6/96	Stmt. of 8/17/96
Atlanta	I was there on 6/12/94.	I was there on 5/10/94.	I was never there.
John Doe	I bought cocaine from him.	I sold cocaine to him.	I don't know him.

D. Reference To Notes and Statements

After organizing the cross-examination materials, you need an easy method of correlating the statements and documents with the notes. No matter what method you use, match the numbers on the statement with the ones on the notes for quick reference. Furthermore, in the line-by-line or paragraph method, number and highlight each line or paragraph in the statement and have that number in the notes with an appropriate page reference to the statement. For example, if the subject is the delivery of cocaine in January 1994 and was the fifteenth line or paragraph on the second page of the statement of February 1996, indicate it in your notes this way:

AL JONES
JANUARY 3, 1994

1. *Stmt. of 2/13/96* "On January 3, 1994, George delivered to me a kilo of cocaine." Line (or Paragraph) 15, page 2.

Add subsequent statements as follows, abbreviating "line," "paragraph," and "page" when necessary.

2. *GJ of 5/6/96* "On January 3, 1994, Richard brought me a kilo of cocaine and left it with Allan for me." Page 15, l. 6.
3. *Stmt. of 11/17/96* "I never got any cocaine." Paragraph 6, p. 4.

Use the same type of identifiers in a column method:

AL JONES

Issue	Stmt. of 2/13/96	GJ of 5/6/96	Stmt. of 8/17/96
Atlanta	I was there on 6/12/94. Par. 15, p. 2	I was there on 5/10/94. Page 15, l. 4	I never went there. Par. 9, p. 1
John Doe	I bought cocaine from him. Par. 80, p. 9	I sold cocaine to him. Page 22, l. 6	I don't know him. Par. 4, p. 2

If there are other documents relevant to the cross-examination, make an appropriate reference to the document or exhibit in the notes.

By organizing the information in the manner described, you can refer a witness to a particular statement during cross-examination. You should hand the witness a clean copy from your file folder and refer the witness to the statement by paragraph, page, or line either to refresh the witness's memory or to impeach the witness: "Mr. Witness, isn't it true that on February 13, 1996, you gave a statement that you were in Atlanta on June 12, 1994? I refer you to that statement on Page Two, at the bottom of the page." You know it to be Paragraph 15, page 2 by the way you structured your notes.

A few words of caution. Keep it simple and never lose sight of the overall picture or the most efficient way of achieving it. In a recent case, I had so much material and was so well-organized that, for a time, I lost sight of delivering it effectively. Over a period of three hours, I hammered home a number of inconsistencies that went to the very heart of the case, but I got so bogged down in detail that I was not being effective. In the last hour or so, I loosened up and cross-examined in less detail and scored many points. Sometimes we can be over-prepared.

V. ASSESS THE DIRECT EXAMINATION

The trial has started. The file boxes are in the courtroom. Your notebooks are on the table. You have given your opening statement. The witness is on direct examination. Now what?

During the direct examination make continuous assessments to determine if, and to what extent, you should conduct cross-examination. Consider the following:

(1) How does the testimony compare with other testimony?

(2) Is your adversary achieving his goals? Many times a witness called by the opposition may not deliver as expected. Will cross-examination prove fruitful or will it give your adversary a chance to improve his position?
(3) How does the witness's testimony relate to pretrial investigation? Is the testimony consistent, inconsistent, or a total surprise?
(4) Is the witness hurting your case? How damaging is the witness? What is the jury's reaction? Can the witness hurt more through cross-examination?
(5) Is the witness helpful? Can the witness help more? Is there a risk of losing what has already been gained?
(6) Is the witness neutral—no real plus or negative for either side?
(7) Is the witness important?
(8) Is the witness's testimony credible?
(9) Is the testimony more positive or negative than expected?
(10) Is the testimony less positive or negative than expected?
(11) What are your planned expectations on cross-examination?
(12) What are the risks in cross-examination?

VI. ASSESS THE WITNESS

Before cross-examination, you should make an assessment of the witness:

(1) Consider the witness's demeanor. Was the witness comfortable or uncomfortable during the direct examination? Was the witness difficult to control? Was the witness hesitant or was she confident in the answers given?
(2) Did the witness maintain eye contact with the jury? How did the jury receive the witness?
(3) Was the witness antagonistic to the examiner, the judge, or the jury?
(4) Was the witness sympathetic?
(5) Was the witness believable?
(6) What was the extent of the witness's opportunity to perceive the events to which she testified?
(7) What was the extent of the witness's opportunity to recall the events or to communicate them to the jury?
(8) What were the witness's strengths and shortcomings regarding credibility or veracity?
(9) Did the witness demonstrate any motive, bias, interest, or prejudice?

VII. THE PURPOSE OF CROSS-EXAMINATION

While the subject matter may change from case to case, the purposes of cross-examination never do. Cross-examination must have a specific purpose and an expected result. If it does not, keep your seat. Many cases have been

hurt and even lost by a misguided or unnecessary cross-examination. The possible purposes of cross-examination include discrediting the witness, impeaching the witness, undermining the damaging testimony of a witness or another adverse witness by cross-reference, eliciting favorable testimony to your position, drawing or creating favorable inferences with other testimony, corroborating favorable testimony for your position, damaging your adversary's case, advancing your case, injecting or enhancing your theme, and tying down an important issue or unanswered question.

VIII. SHOULD YOU CROSS-EXAMINE?

Even though you have assessed the direct examination and know the purposes of cross-examination, the next important step is determining whether you should cross-examine at all. Consider the following issues:

(1) Can the witness be discredited? There are many potential issues here, such as rewards for testimony; prior record; character; demeanor; and interest, bias, or motive.
(2) Can the testimony be discredited? If the witness's testimony can be attacked successfully, then the witness is also discredited. In evaluating whether the testimony can be attacked, consider both prior inconsistent statements and whether the testimony differs from physical evidence, scientific evidence, expert opinions, or testimony of other witnesses.
(3) Do you want to discredit the testimony or the witness? You must make an assessment as to whether the witness or the testimony should be attacked at all. Did the witness or the testimony hurt or help? Was it something that can be built on to create a favorable set of facts or inferences for your position? Will discrediting the information or the witness advance your position or set it back? Will you create sympathy for the witness, such as by cross-examining a child witness, a sexual assault victim, or a mother of a victim or defendant?
(4) Should the witness be cross-examined at all? If the witness was unimportant, did not hurt the case, did not help the opponent, and cannot help your case, why cross-examine at all?
(5) Can you bring out favorable facts? Cross-examination does not have to be utilized solely to attack the opposition; it may be very useful to bring out favorable facts. The eyewitness to a homicide can be asked if she heard the victim make a threat or saw an aggressive gesture. Does she have knowledge about the victim's or defendant's reputation for turbulence and violence?
(6) Can you create favorable inferences? In a trial you should look at facts and rely on inferences—issues to argue about which support your case. Consider exploring with a witness what has not been testified about, what has not been shown, what has not been done, or who has

not been called. For example, have a witness testify that a blood alcohol test was not performed on the victim. A favorable inference can be drawn from that fact in view of another witness's testimony that the victim appeared to be under the influence and acting aggressively.

(7) Can you elicit unfavorable facts? What information does the witness have that would be unfavorable to the other side? Does she know that the victim or defendant carried a gun and reached for his pocket? If it was not asked on direct, you may want to ask it on cross-examination, but beware of traps.

(8) Can you create unfavorable inferences? How many people were witnesses, and how many of them are being called? Why are the others not being called? Can we draw an unfavorable inference from the failure to call these witnesses during the closing argument? Under this category and the previous one, it is very important to elicit testimony of what is not being done or what was not done to create the best unfavorable facts and inferences, such as crime scene investigation, general investigation, tests, or failure to call witnesses.

(9) Can you hurt your case? This is a constant evaluation. You will have to decide whether the cross-examination will elicit unfavorable facts in your case or give the opposition an opportunity to come back on redirect and bring out a forgotten or unfavorable fact.

(10) Every question asked, every fact developed, and any inference drawn should be constantly integrated into the whole case. Determine what you can ask and what answer you can get that will help undermine the opposition's case, advance your case, or leave for closing argument the opportunity to bring all of it together through favorable facts and inferences.

IX. GENERAL AREAS OF CROSS-EXAMINATION

This Part of the Article examines many general points of cross-examination. First, your cross-examination should establish bias, interest, motive, or prejudice. You should bring out from the witness, or through other witnesses, what a witness has to gain or lose from testifying. Explore plea bargains, promises, prior relationships, monetary rewards, and racial attitudes. Cover everything that will give a witness, or might potentially give a witness, a reason to give untruthful or jaded testimony. What facts about the witness's background impeaches his credibility? To determine this, explore the prior record and other permissible areas of attack on character.

Next, establish any inconsistency with another witness. By effective cross-examination, the advocate can put one opposition witness against another or an opposition witness against one of your own witnesses whose testimony you know will hold up. Very rarely will two witnesses be entirely consistent with each other in giving a set of facts. Explore and widen the division between

these facts to impugn the current witness or another witness. Pin them down on major inconsistencies and be prepared to argue the unlikelihood that two people testifying truthfully about the same event could give such contradictory testimony.

You should also establish inconsistencies with the physical evidence. For example, if the physical evidence shows there was an altercation and the witness testifies there was no such altercation, then there is a direct contradiction between the physical evidence and the testimony, thereby undermining the witness's testimony.

Also establish inconsistencies with things that were done. If the police officer testifies that he ran your client's license plate number and it came back registered to the client, but the Highway Department has not yet recorded the transfer of ownership to your client, then the witness's testimony is discredited. Similarly, establish inconsistencies with things not done. If the fingerprint expert testifies that an individual's prints were eliminated from known prints at a crime scene, but the expert never got a correct set of prints from the person eliminated, an inconsistency is established.

Likewise, you can establish an inconsistency through common sense. Assume that a man constantly beats his spouse, but unfriendly witnesses testify that although the man was being abusive, he did not strike or threaten the woman before she fired the fatal shot. Common sense and experience would indicate otherwise.

Equally important is establishing any omissions. What was not done at the crime scene? What was not done in the investigation? What test was not run? These are all fertile areas for cross-examination. Furthermore, you should establish inconsistencies between what the witness testified to and what he previously said. Also establish inconsistencies with the opposition's theory of the case, even if you do not score a knock-down. For example, if the State says the crime is murder, but a witness through his testimony or his previous statement opens the door for you being able to argue manslaughter, then go for it on cross-examination. Next, establish inconsistencies between the witness's testimony and what does not exist. If the witness testifies that the defendant got on a flight to New York, but the flight does not exist, then the witness's credibility is undermined.

In addition to inconsistencies, establish consistencies, corroboration, and support for your theory. Just as the previous suggestions can be used to undermine the opposition's case, each area can equally be used to establish factual issues in your favor by eliciting favorable facts, facts which are consistent with other favorable information in the opposition's case or your case, and favorable facts and inferences to be brought together in closing.

Lastly, if witnesses are testifying to the same facts with seemingly rehearsed versions, pin down the important issues and point out how unlikely it is that two or more witnesses could testify identically to the same exact issue.

X. OUTLINE OF A CROSS-EXAMINATION

There is no one organizational plan for cross-examination. While having a set form is desirable, flexibility remains essential. The testimony of a witness will sometimes direct the order of the cross-examination. There may be occasions first to reinforce favorable facts, and there may be occasions to attack credibility first, but at one time or another the suggestions below should be covered or at least considered.

1. Reinforce the favorable facts from direct examination—not only the obviously favorable, but also the subtly favorable. Be careful that you do not give the witness an opportunity to correct favorable testimony. In other words, do not seek to reinforce what can be changed.
2. Reinforce or elicit favorable information that blends with other facts or other witnesses to impeach what should be impeached and to strengthen what should be strengthened. An exception to this suggestion exists when you do not want to make an issue obvious, but instead want to save it for closing argument at which time it cannot be effectively refuted. This exception may apply to a key document, phone number, date, test result, or description.
3. Reinforce or elicit facts that are consistent with your theory.
4. Reinforce or elicit facts that assist your position.
5. Establish how the facts relate to other favorable issues.
6. Reinforce and suggest favorable inferences.
7. Have the witness admit what is obvious or undeniable.
8. Reinforce or elicit all facts that corroborate what you seek to prove.
9. Discredit the witness as to motive, bias, interest, prejudice, credibility, prior record, promises made to the witness, or other negative inferences.
10. Discredit the witness's testimony through cross-examination on perception, physical limitations, environmental limitations, memory or recall, knowledge of events, prior inconsistent statements, and negative inferences.
11. Discredit the witness and testimony through inconsistent conduct, such as failure to come forward at an earlier time.
12. Point out how a witness's testimony differs from other witnesses'.
13. Bring out how the witness's testimony contradicts the opposition's theory, especially in the case of one of its own witnesses.
14. Show how the witness's testimony has changed from direct examination to cross-examination.
15. Demonstrate lack of truthfulness by showing how statements and testimony have changed to conform to other testimony or physical facts.

XI. WELLMAN'S FORMULA FOR AN EFFECTIVE CROSS-EXAMINATION

In *The Art of Cross-Examination*, Francis Wellman identifies characteristics he thinks are essential for an effective cross-examination.[2]

(1) *Use a Logical Thought Process.*[3] Know where you are going and how you believe you can get there.
(2) *Have "Clearness of Perception."*[4] Keep your objectives in mind.
(3) *Have Patience.*[5] Work for it and it will come.
(4) *Maintain Self-Control.*[6] A lawyer may react to an answer or the lack of a response, but he should always stay in control of his emotions.
(5) *Use Intuition.*[7] A plan for cross-examination is fine, but probing for an answer you think may be there can carry the day.
(6) *Do Good Character Study.*[8] A lawyer should know people, their strengths and weaknesses, and their biases and prejudices.
(7) *Be a Good Judge of Character.*[9] A lawyer must not only perform a good character study, but should also be a good judge of a person's character.
(8) *Understand the Motives.*[10] Know what makes a witness lie or shade the truth.
(9) *Be Able to Act with Force and Precision.*[11] Once the advocate perceives an opportunity, it should be seized.
(10) *Use Caution.*[12] Knowing where to go, how far, and when to stop is critical.
(11) *Use Instinct.*[13] A lawyer should develop instinct to probe, find the weaknesses, and disable a witness. A lawyer searches and questions, but he must also have the instinct to know when the weaknesses are discovered and when the witness is wounded. Once wounded, the lawyer must know how to neutralize him or turn him around to help the case.
(12) *Have Thorough Knowledge of the Subject Matter.*[14] This is

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2. While the italicized subtitles in this Part are the product of Francis Wellman, the editorial comments are this author's.
3. WELLMAN, *supra* note 1, at 8.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

probably the most important characteristic of an effective cross-examination. Notes are helpful, but the cross-examiner must act on instinct, and instinct is dependent upon complete knowledge of the subject. Knowledge and instinct are the great combination.

XII. THE LAWYER

Over the years, I have watched many lawyers in the courtroom, and as a result I have tried, abandoned, and developed a number of techniques. The key is to find and develop a technique that works for you, that you feel comfortable with, and that will help you effectively convey your message to the jury. I am sure that every lawyer could add to or subtract from the list of ideas that follows, which is as it should be. With a hundred lawyers you will find a hundred styles.

Appearance is an important part of effectiveness. Put yourself in a juror's position. Would you be more inclined to listen to and be persuaded by someone who is neat or by someone who is sloppy? Obviously, the answer is the former. People who care about their appearance exude a level of confidence, and that confidence is communicated to the jury. The lawyer should also *have* confidence in himself. I know I am communicating a positive message to the jury when I am confident in the courtroom. Occasionally, maintaining confidence for an average case is difficult. The evidence may be overwhelming, the client unsavory, and everyone expects and wants you, the defense, to lose. In such a case, what is there to be positive about? Yourself! You are prepared, you know the case, and you know how to perform. You should have confidence in that. Never let the jury sense that you think you are a loser or that your case is a loser.

Furthermore, have confidence in your case. Jurors sense when a lawyer feels good about his case and when he lacks confidence in it. Think about cases you have previously tried. When you had confidence in those cases, you were more persuasive and more sure of your ability to communicate with the jurors. You looked at the jurors, the jurors looked at you, and you felt a justness in your cause and the positions you had taken. Compare that to the occasions when you have gone in with little or no confidence in the case. You did not appear as positive, and the jury likely sensed that you did not believe in the case yourself.

During the direct examination of a witness, watch the jury. How is the witness coming across? Is the jury looking at him or away from him? Are they looking at the prosecutor or away from him? Or are they looking at defense counsel or the defendant? Study the jury so that when it is your turn, you can take advantage of any positive feedback or attempt to neutralize or make more favorable any negative feedback.

Position yourself during the cross-examination so that you and the jury maintain eye contact as much as possible. You may then see their reaction. Examine the witness so that he must look at both you and the jury. Jurors pick

up body language. Is the witness looking at them or away from them? Is he looking down or up? Is he hesitant or confident? Move around while conducting your examination. Use gestures with your hands, arms, and face. Do not be rigid, but also do not move around just for the sake of moving. Move with a purpose. A good point may be made by examining a witness from a distance or by closing in on the witness to alert the jury that you are making a point that deserves close attention. Use a movement to catch the jury's attention. If they are drifting, inattentive, or saturated, move. Like a good fencer or boxer, move in and out. Go to the witness, make the point, and move back out. A witness may become intimidated after a while, knowing that you are moving in to make a strong point. The jury will eventually understand the meaning of your movements, too.

Use your voice. Some lawyers speak in a monotone. Others speak at a rapid pace. Some lawyers speak loud; others low. Some lawyers stay excited; others would not know how to get excited. You should develop a range of styles of examination and speaking. You cannot expect to retain the jury's attention or have them know when something important has been said if you stay with one method or one tone all the time. Similarly, develop different styles of questioning. At certain times you will need to be probing, inquisitive, demanding, accusatory, or indignant. Communicate to the witness and jury through your particular method of examination. If you constantly speak in a loud manner to a witness, you will lose the jury. They will not know when you have made a point. Use a range of emotions and a range of voice inflections: from confidence to indignation, from belief to disbelief, from satisfaction to non-satisfaction, and from demanding to passiveness. The point is to communicate with the jury. Your voice and tone will send your message to the jury. Through your voice and style of questioning, you can also send a message to the witness. That message is control. The witness will understand, and so will the jury.

Control the witness. Your voice and your style of examination will go a long way to establishing control. Let the witness and the jury know when he is not responsive. Let the witness and the jury know that you will not let him "off the hook" until he answers a question. Let the witness and the jury know that *you* know when he has gotten hooked and that he is not going to get off easy. Let the witness and the jury know that unnecessary and unwanted answers will not be tolerated. Complain to the judge and eye the jury. Ensure that the witness gets away with nothing that undermines your control. He is in the witness chair, and you are asking the questions.

As part of your effort to control the witness and the direction of cross-examination, you should not argue. Be forceful and persuasive, but be courteous. Be relentless. The failure to answer your question should be met with, "So the answer to my question is 'yes'?" (or whatever the issue may be), or, "Let me repeat my question in a different way." Put the witness in a position of having to either answer the question or face the jury's awareness that he has not and will not.

Remember that the jury and the witness have their eyes on you. Act natural in the courtroom, like you belong there. This is your home and place of work. Do not be stiff! Great trial lawyers have a sense of theater. Actors play a part and have passion, a sense of timing, a style in movement, and the ability to deliver a convincing performance. That is why we relate to them, remember them, and like them. A lawyer should do the same. Think about every trial lawyer that you know who has achieved some degree of success. They possess a uniqueness that they bring into the courtroom. Once you realize that trying cases and conducting cross-examination is not just a job, but an experience—an art—your courtroom performances will be more gratifying, successful, and memorable. The next time you try a case and conduct a cross-examination, loosen up, move around, mix your voice, and add some drama. You may surprise yourself.

You should maintain credibility with the witness and the jury. When you stake out a witness on an issue, a prior inconsistent statement, or a fact in evidence, make sure you are right. Nothing will lose a jury faster, or cause a witness to develop a dangerous degree of confidence, than the lawyer being wrong about what has been stated.

During an examination, never take your eyes off the witness. Your eyes will see things that others in the courtroom will not—a sense of doubt, hesitancy, lack of confidence, or a lie. Let the witness know that your eyes will rarely leave him; never give him an opportunity to relax or time to conceal.

Listen! Listen to the witness's every answer and the manner in which it is delivered. After a number of examinations, you will know how comfortable a witness feels about an answer simply by listening to him. Was the witness sure? Was he confident? Is he hiding something? Is he afraid of the next question? Listen to what has been said. Many lawyers do not listen to the answers. They follow a script or think about the next question. You should hear what the witness said. A word or a phrase may prove to be an important opening in the cross-examination. Remember your instinct! If you listen carefully, you may discover an area that undermines the credibility of the witness or the facts themselves.

A cross-examiner should never show that he has been wounded or hurt by an answer. Do what you can to deflect or minimize it, but never let on that you know it was damaging. Try to convince the jury and the witness that the answer was expected and the question was necessary. Try a little humor. Humor is a great deflector. In the final analysis, move on when you can.

XIII. PRIOR STATEMENTS OF WITNESSES

The most effective tool for the impeachment of a witness is the existence of a statement that was made before trial and is inconsistent with the trial testimony. No single issue that a lawyer can raise is more important to credibility.

Use imagination to find the inconsistent statements. These statements need

not be in the form of sworn testimony. Search for these statements in investigative reports, investigative notes, statements of other witnesses, documents, business or financial records, sworn statements, oral statements, prior sworn testimony, pleadings, casual conversations of the witness, and plea proceedings.

Prior inconsistent statements may take the form of an affirmative statement that is inconsistent with the trial testimony or with the absence of a statement. In other words the failure of a witness to state a fact is just as important as the statement of a fact.

Inconsistent statements are useful in exploring how a witness's prior statements differ from her trial testimony and with the testimony of other witnesses, exhibits, known facts, or forensic results. Anytime a lawyer can explore some inconsistency by way of affirmative statements or omissions, it should be seized and pursued. In developing prior inconsistent statements or omissions, keep in mind that you want to bring out the prior statements or omissions against a backdrop of how and why a statement was changed.

Where there are several inconsistent statements or omissions, they should be catalogued and brought out either in chronological fashion or in a manner that maximizes their effectiveness. Simply bringing out the fact that there were inconsistent statements is not effective. Instead, show how the inconsistencies were developed or how the omissions were filled in over a period of time and, most importantly, why. This can be done only by showing the evolution of the statements against a backdrop of the events. To accomplish this you must carefully organize your note cards or witness-statement charts. Identify on the card, notebook paper, or legal pad the issues that are most important to cover. You may have uncovered dozens of potential inconsistencies or omissions. You could do a textbook cross-examination, bringing out every single inconsistency or omission, but you may not retain the attention of the jury, and, more importantly, the jury may not know what is important or how to distinguish it from the "fluff."

In a recent case, I got bogged down in inconsistencies and omissions. The cross-examination was less than effective until I put aside the "fluff" and went for the heart of the issues. In that case there were at least six separate pretrial statements. Each pretrial statement was inconsistent with one another and with other trial testimony in a number of areas. Although I could have stayed on the inconsistencies all day, I was losing the jury. The witness obviously kept changing her story. The real issue was to identify what was really important. Accordingly, do not lose the forest for the trees. Keep in mind the overall picture, not the minute details.

A. Pre-Arrest

The witness should be examined with a view toward showing that, at the time of the statement or omission, the witness was not under charges and was not responding or was failing to respond because of charges or the threat of

charges. Bring out to whom and where the statement or omission occurred.

B. Post-Arrest

Explore the circumstances under which the statement was made. What were the charges, and was there a threat of other charges? What information did the police give the witness? What information did the witness give the police? What physical facts or other issues were known to the witness or divulged to the witness? How many interviews were conducted? What were the dates and length of time between statements? What were the various changes in the statements? Were there any deals made or suggested?

C. Proffers/Post-Plea Agreement

Statements made at this stage need to be explored fully because the chances that a witness will conform testimony becomes more of a motive in the witness's exploration of a deal or after the deal has been made. What was offered? Did the witness accept the first offer? What was the witness's exposure? What are the terms of the agreement? What was the prosecuting authority giving up, not pursuing, or compromising? What was the full benefit to the witness? Explore what information was made known to the witness before a statement was made, such as tests, physical facts, or statements of other witnesses.

D. Where the Witness Is Not a Co-Defendant or Accomplice

Most witnesses are not going to be "cooperating witnesses." When examining uncooperative witnesses, showing that their prior inconsistent statements were the result of some fear, reward, or hope of reward is difficult. You should develop the circumstances under which the statement was made or the omission occurred. Was the statement made under the emotion of an event or on clear reflection? Was it a casual conversation or an interview? Was information given to the witness that was previously unknown to the witness? Did the witness change versions? If so, why? Did the witness speak with other witnesses or prepare for trial with a law enforcement official or prosecutor? How long after the event were the various statements made? Does the witness have any other motive, bias, prejudice, or relationship to the cause?

With respect to all of these situations, keep in mind two things. First, in seeking to explore the circumstances of a prior inconsistent statement or omission, determine which version of the events you want the jury to believe. Your examination must lend credibility to the facts you want the jury to believe and those you wish to impeach. Second, use one witness against another. While you may not get all the information wanted or needed from the witness you seek to impeach, you may obtain the information from another witness. One option is to examine the person to whom the statement was made as to the

circumstances surrounding the statement.

XIV. CROSS-EXAMINATION TECHNIQUES

There are as many cross-examination techniques as there are lawyers. Many have been covered, and many do not fall into any particular category. In this Part, I explore some successful techniques.

The most important aspect of developing or exploring various techniques in cross-examination is to have a plan. In other words know where you are going and what you want to achieve. Do you want to impeach? Do you want to cast doubt? Do you want to further your own theory? Do you want to accomplish a combination of these things? Once you charter a course, which of the various cross-examination techniques to apply will become apparent.

It is important to orchestrate the cross-examination. Plan cross-examination as you would script a play. At the outset seize both the witness's and the jury's attention. This may be accomplished by impeaching the witness's credibility with either a criminal record or some bias, motive, or prejudice such as a favorable deal. Take the witness off her high ground!

Somewhere during the middle of a cross-examination, plan to raise other important issues to attract attention. You will not always be able to keep the jury riveted to the edge of their seats. Periodically you will have to alert them. At such a point, start to examine a witness to bring out some differences between her testimony and the testimony of other witnesses or of the physical evidence.

Conclude the cross-examination on a high note, a climax. Try a series of questions that hurt the witness's credibility before the jury. Pose a series of questions with which the witness must agree and that will hurt the opposition or enhance your position. Another method is to pursue prior inconsistent statements. Plan the cross-examination so as to maximize the effect of what is being brought out. Some specific considerations are as follows:

Notes. Preparation and a good outline are essential to a well-developed, effective cross-examination. Just as an actor uses a script for rehearsal and then abandons it for the real performance, the lawyer should learn the outline and know where the information is for reference, but not rely on it totally for cross-examination. There are several problems with notes. The first is that many lawyers who refer to notes are thinking about the next question rather than listening to the answer from the last. The answer is far more important than the next planned question because it may contain the key to the door you are seeking to open. The second important factor about notes is that without them you are more able to control the witness by bearing down, asking question after question, and penetrating the foundation of the witness's story. By constantly referring to notes, you lose rhythm and momentum, which can be hard to regain. Rhythm and momentum can carry the day in the courtroom.

Rhythm and Momentum. This refers to the exchange back and forth between you and the witness. By asking questions and getting the answers

expected or wanted, you establish a certain cadence. You become more effective, more probing, and more penetrating. The witness becomes less sure, more ill at ease, and easier to catch off guard. You know where you are heading. The witness may not know where you are heading, but even if she does, she cannot stop it. The most important factor is that the jury knows what is happening, senses it, and is captured by it.

Jabbing and Punching. Watch a prize fighter. He bobs, weaves, jabs, and punches. In the courtroom a lawyer can do the same thing. Do not always follow the script. Move around with themes or specific areas of questions. Develop an idea, ask the questions, and move on. Come back to the idea in a new way at an unexpected time. Remember that if the other side did its homework, the witness will be prepared. Try to catch the witness off guard by asking the expected in an unexpected way or at an unexpected time. Probe, withdraw, and probe again.

A prize fighter does not constantly throw punches. If he did, he would lose his delivery power quickly. More importantly, his adversary will have his guard up. If every punch is an expected knockout punch, it can and will be deflected. The fighter jabs to find an opening, to penetrate, to test, but most of all to set up a knockout punch. Do the same with the cross-examination. Move in and move out. Probe and penetrate. Once you find the opening, go for it.

Foundation Building. A good cross-examination requires foundation building. You will get an answer if you ask, "Was the light green?" It may be what you wanted, but it is not very dramatic. Build up to issues for effect. "Where were you? Where were the other vehicles? How long had you been there? Did the car move? Did you see the light change? So you actually saw the car move before you saw the color of the light? Therefore, you don't know if the light had turned green or the car had moved before the light turned green? It was an assumption on your part!" This is a rather simple example, but it should demonstrate the point. By first establishing why or how the person knows or does not know something and then moving in, you will be more effective.

The Box. Assume that a witness has testified that your client shot John Doe in cold blood. She is fairly convincing and unmovable. If you ask, "Wasn't my client really in fear of his life?" the witness will answer, "No!" Put the witness in a box by asking a series of questions or making a series of statements designed to box in the witness and prevent escape: "John had a knife! John had threatened to use the knife. John had used the knife before and you saw it. The defendant was backing up. John was yelling at the defendant. John is 6 feet 2 inches and the defendant is 5 feet 9 inches. John is 240 pounds, the defendant is 180 pounds. People were yelling."

By making a series of statements or asking questions, you box in the witness. She has no escape. It does not make any difference what she says. The point you are making is clear: there was a hostile situation, and your client had reason to fear for his life.

Leading Questions. The single best tool for the lawyer is the ability to ask

leading questions, questions that truly suggest an answer. Knowing your opposition's case and your own case allows you to design questions that direct the course of a cross-examination. Leading questions make a statement. You put the information you know or believe to be true into the question and seek a desired answer. This is advantageous because you have scored a point if you get the desired answer. If you do not get the desired answer, you have created an issue which you then should be able to tie together in another way by asking the following: "Isn't it true that John did not hold his liquor very well?"; "Isn't it true that John would get aggressive and loud when he drank liquor?"; and finally, "Isn't it true that John was drinking heavily the night he was killed?"

Use leading questions because they control the direction of the examination, help control a witness, and are closed-ended. A witness should not have the opportunity to speculate, elaborate, or give opinions. The witness must answer the question propounded. Never use open-ended questions unless the answer cannot hurt you. Never ask a witness, "Why?" You may find out.

Favorable Facts. Determine from your investigation and the direct examination every favorable fact. Using leading questions, establish these facts at some point during the examination. Do not be preoccupied with cross-examination solely for the purpose of attacking the opposition. Use it to enhance your own case. There are very few witnesses that will not have at least a few things to say that can help your case: "My client turned himself in?"; "You read him his *Miranda* rights?"; "You told him he didn't have to say anything—that he could have a lawyer?"; "He did not ask for a lawyer—he talked to you?" Even a hostile investigator will have to answer those questions favorably. If the prosecution has not introduced an exculpatory statement, the next question could be, "You have not introduced my client's statement, have you?" Don't ask why–it will be apparent.

When pursuing favorable facts, structure them so that the witness will have to agree with you frequently. Getting the witness to agree with you has a positive influence. You appear to be winning even if you are not.

Omissions. Cross-examine on the omissions. What was not done? What was not said? Rather than reemphasize negative information, probe for the favorable. For example, in a driving under the influence case, ask the officer about all the observations not testified to which would indicate that the client was *not* under the influence. If the officer says the defendant had alcohol on his breath, had bloodshot eyes, stumbled, and had slurred speech, all of which caused him to conclude that the defendant was under the influence, examine the officer on what was *not* observed which would indicate that the defendant was *not* under the influence. For example, find out if he stopped the car quickly, got out of the car on his own, did not brace himself on the car, produced his license and registration, understood the questions, and walked on his own. You can think of a hundred things your client did or did not do that would create an arguable inference that he was not under the influence.

Contrast. Through your questions, develop a contrast in the way the witness deals with you and your opposition, not only in the method of

communication, but also in substance. If the witness is rude or confrontational, make the rudeness or hostility evident. This type of attitude goes toward credibility. If the witness does not want to answer or is reluctant to answer, stay in pursuit. Get the witness to say "I don't know" or "I don't remember." This goes to the witness's credibility by showing the contrast.

The Hook and Net. Witnesses do not want to give unfavorable testimony to the side that called them or favorable testimony to the other side on cross-examination. They will do everything possible not to answer directly or to avoid an issue completely if the question will elicit an unfavorable response. Do not let them. Develop phrases and body language that do not let the witness off the hook or out of the net: "Ms. Jones, your answer was 'No?'"; "Ms. Jones, was that a 'yes' or a 'no' answer?"; "Ms. Jones, your answer was, therefore, that the light was green?"; "Ms. Jones, I did not understand your answer."; "Ms. Jones, let me see if I understand your answer, it was that the light was green?"

Stay with a witness. Let her know that you will keep coming back to the question or give your own interpretation to an evasive answer. Also, use body language the same way. When a witness is evasive or answers every question with a long explanation, try to cut her off and have her admonished. If all else fails, walk around bored to convey to the jury that the witness is not answering the question, is being hostile, or is simply trying to be argumentative or evasive. Your body language can convey the message.

Comfort. If the witness is too comfortable in the witness chair, get her out of it. These are unfamiliar surroundings for her, but not for you. Have her come down from the chair to demonstrate, draw, or point on a picture or chart. Make the witness uncomfortable, then put her back in the chair. Repeat as necessary and send the message that she is on your home court.

Closing. Know when to stop, and stop on a high note; but before you do, set the stage. Pause. Walk to your table. Wait a few moments. This is what is referred to as the "pregnant pause." Let everyone think you are done, let them get comfortable, or let them anticipate what you will do next. Whatever the reaction, the result will be the same—attention. Then close in for the one final conclusive question or series of questions: "Mr. Jones, I forgot to ask you . . . ."

XV. SUMMARY OF TECHNIQUES FOR CONDUCTING A CROSS-EXAMINATION

Rule 1. Do not take your eyes off the witness. You must remain in control. The witness is aware that every movement and word is being assessed by you in developing the cross-examination. Maintain a sense of "no escape." View every movement in the witness's eyes and body, as well as the ease of her response. Is the witness looking at the examiner, jury, courtroom, or floor? Is the witness fidgety, comfortable, or getting uncomfortable, as the theme is developed? The eyes reveal many secrets and conceal very little.

Rule 2. Listen to the witness's voice and the words by which she answers. Is the witness's voice expressing nervousness, evasiveness, or lack of candor? Does the witness answer the question asked? The answer should direct the examiner to the next question, instead of coming from a script. The answer may contain a lead never thought of, hoped for, or anticipated. Seize the opportunity. Listen!

Rule 3. Once you determine what type of witness is on the stand, you should adapt your personality and style to the character at hand. An effective cross-examiner must know people and know that one personality and style does not work for every witness. An actor must act; a lawyer must react. Many cases have been lost because the lawyer needlessly savaged a witness with whom the jury sympathized when he could have carried the day with a gentle, but probing examination.

Rule 4. Cross-examination should have a purpose, and that purpose should be intertwined with the theory of the case. A lawyer cannot expect to know the answer to every question asked, but every lawyer should know why a question was asked, how it fits into the overall theory of the case, and if he can soften or minimize a damaging answer by further questioning or by another witness, exhibit, or closing argument. A lawyer does not win by asking the most questions on cross-examination; rather, a lawyer wins by getting the answers needed to advance his case or to weaken the adversary's case.

Rule 5. The propounded question should leave no room for various interpretations by the witness, the court, or the jury. Questions should be sharp and clear and should require a sharp, clear answer that either damages the other party or advances your case. If the questions are not subject to vague interpretations, the jury will know whether the witness is being responsive.

Rule 6. Control the witness. After a series of questions, the examiner will know the attitude, demeanor, and ability of the witness. Like any good chess or card player, the lawyer should finesse the witness. If the witness is witty, sarcastic, or argumentative, use that against the witness to control her. Show the witness who the examiner is and who the witness is and that the questions require serious, concise, and straightforward answers. Let the witness know that any other answer or any other manner of response will not be accepted by you or the jury. The examiner must do this without showing anger or frustration because those indicate a lack of control. Control and a dogged pursuit are the earmarks of an effective cross-examination.

Rule 7. Cross-examination is no less a game of skill than is chess. The chess player must have an overall strategy to win the game, designing each move to bring about a desired result eventually. Along the way, the chess player makes some sacrifices to further the overall strategy and to corner the adversary into check-mate. Great chess players always view the overall plan, not a single move. So it is with the cross-examiner. A temporary success, even a temporary defeat, is of no consequence if the overall plan is sound and in place. Questions should be designed to build on each other to bring about a desired result. Victory will be determined at the end of the cross-examination

if you have weakened your adversary's case, advanced your own, or accomplished both.

Rule 8. Underestimating an opponent is a major factor in defeat. Many contests have been lost because one side was overconfident due to a perception of lack of skill or experience of the adversary. A trial is the ultimate contest of preparation, skill, experience, and the ability to deliver effectively. Any adversary is capable of delivering a fatal blow with one question or a series of questions. Stay tuned, stay sharp, and stay on top. Do not take an adversary for granted.

Rule 9. During a trial, the jury may focus on the lawyer. Jurors come into the courtroom with expectations of what lawyers do and how they do it. While jurors may differ as to the means and methods employed, they generally agree that the courtroom is an important institution that deserves great respect, especially from those who participate in the process. The trial lawyer, and in particular the lawyer on cross-examination, is expected to be an advocate and is expected to advocate his position forcefully, but at the same time the jurors expect deference to the court and civility between counsel.

Rule 10. While cross-examination may be the advocate's greatest weapon, it may also be the greatest source of self-destruction. Maintain discretion regarding what to ask, when to ask it, and when to keep your seat. The advocate must remember these points before asking even the first question. Do not worry about what the jury, the judge, your adversary, or the audience will think about your questions or your lack of questions. Know where you are going and plan the most effective way to get there. The points best made are the ones the jury takes with them into the jury room when they retire to deliberate. That is where and when the impact counts, and those points will be driven home during closing argument.

XVI. SOUTH CAROLINA RULES OF EVIDENCE AND CROSS-EXAMINATION

The South Carolina Rules of Evidence guide lawyers in their cross-examination strategies.

A. Rule 404

The State may cross-examine the defendant or a witness as to character traits offered by the accused.[15] Rule 404(a)(2) allows the defense to offer evidence of a character trait of the victim.[16] For example, the defense in a homicide case may want to offer evidence of the victim's character trait for turbulence or violence. This type of information will enable a jury to weigh who may have been the aggressor. If the investigation has been thorough and

15. S.C. R. EVID. 404(a)(1).
16. *Id.* 404(a)(2).

the State's witnesses have been interviewed, the most effective method of developing these issues is to bring the information out through cross-examination. Having a State witness testify that the victim was a violent or turbulent person is effective because it is an adverse witness. You should be sure of the answer before asking such a question, and that can be accomplished only by interviewing the witness beforehand.

Additionally, under Rule 404(b), the State may cross-examine a witness or defendant to show a defendant's "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."[17]

B. Rule 405

Rule 405(a) allows a lawyer to pursue on direct or cross-examination evidence of character or a trait of character by examining the witness "as to reputation or by testimony in the form of an opinion."[18] In a recent murder case, I was able to bring out on the cross-examination of the investigating officer the fact that the victim was well known to the police as a violent individual.

Moreover, Rule 405(b) permits a lawyer to go into specific instances of a person's conduct where character or a trait of character is an essential element of a charge, claim, or defense.[19] The Rule does not limit the inquiry to proof in the case-in-chief, so inquiry can and should be made by cross-examination if possible.

C. Rule 406

Rule 406 is the rule regarding habit or routine practice. The Rule states, "Evidence of the habit of a person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."[20] Consider utilizing this Rule during cross-examination.

D. Rule 607

Rule 607 refers to the impeachment of a witness and is very important in cross-examination. Under this Rule, the party calling the witness may attack the credibility of the witness.[21] The Rule does not establish any specific procedure to follow, but it appears that the witness can be cross-examined as to credibility without any special showing as long as the attorney complies with

17. *Id.* 404(b).
18. *Id.* 405(a).
19. *Id.* 405(b).
20. *Id.* 406.
21. *Id.* 607.

the other rules of evidence. A lawyer can utilize this rule very effectively by calling a hostile or unfavorable witness if such a witness possesses necessary information and if the witness was not called by the other side.

E. Rule 608

Under Rule 608, a lawyer may attack or support a witness's credibility "by evidence in the form of opinion or reputation," subject to two limitations: "(1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."[22]

Rule 608(b) does not permit proof of extrinsic evidence of specific instances of conduct "for the purpose of attacking or supporting the witness' credibility."[23] However, on cross-examination the Rule allows inquiry "concerning the witness' character for truthfulness or untruthfulness, or . . . concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."[24]

No South Carolina cases have interpreted the type of conduct that would affect a witness's credibility. However, the federal courts have limited such inquiries for specific instances of misconduct to those instances which are "probative of truthfulness or untruthfulness"[25] such as forgery,[26] bribery,[27] false pretenses,[28] and embezzlement."[29] In other words, the crime itself should have honesty as an element. A crime, even a crime of moral turpitude, is not necessarily admissible without an element of truthfulness or untruthfulness.

Finally, Rule 608(c) allows cross-examination of "[b]ias, prejudice or any motive to misrepresent" through "examination of the witness or by evidence otherwise adduced."[30]

F. Rule 609

Rule 609 changes the limits of cross-examination of a witness as to a prior record. If the witness is one other than the accused, the witness may be impeached by a crime that "was punishable by death or imprisonment in excess

22. *Id.* 608(a).
23. *Id.* 608(b).
24. *Id.*
25. 4 JACK B. WEINSTEIN'S & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 608.12[4][a], at 608-32 (Joseph M. McLaughlin ed., 2d ed. 1999); *see id.* § 608.12 [4][a], at 608-32 n.13.
26. *Id.* § 608.12 [4][b][ii], at 608-35 & n.19; *id.* § 608.12 [4][b][iii], at 608-36.
27. *Id.* § 608.12 [4][b][ii], at 608-35; *id.* § 608.12 [4][b][iii], at 608-36.
28. *Id.* § 608.12 [4][b][iii], at 608-36.
29. *Id.*
30. S.C. R. EVID. 608(c)

of one year."[31] If the witness is the accused, he may be impeached by such a crime only "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused."[32] If a crime "involve[s] dishonesty or false statement," it may be inquired into "regardless of the punishment."[33]

The Rule also establishes a ten-year limitation on the inquiry into past convictions.[34] The conviction may not be inquired into if "more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date."[35] The Rule may be relaxed if the court finds that "the probative value of the conviction [older than ten years] substantially outweighs its prejudicial effect."[36] Under these circumstances, the attorney must give notice to the other side of an intention to use such a conviction, so the adverse party may have the opportunity to contest.[37] Lawyers often forget this requirement in the haste of preparation for trial.

G. Rule 611

Under South Carolina's Rule 611(b), a lawyer may cross-examine a witness as to any relevant matter.[38] The Rule rejects the narrow approach of the federal rule limiting the cross-examination to matters brought out on direct.[39] If the adverse party calls a witness, then the witness is fair game.

In addition Rule 611(c) generally permits leading questions on cross-examination, including "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."[40]

H. Rule 612

When a witness uses a writing to refresh his memory while testifying or before testifying, an adverse party is entitled to examine the writing, cross-examine on it, and introduce into evidence relevant portions of it.[41] On a claim that the writing contains unrelated matters, the court excises those portions and allows the edited version.[42] If there is an objection, the court must preserve the

31. *Id.* 609(a)(1).
32. *Id.*
33. *Id.* 609(a)(2).
34. *See id.* 609(b).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* 611(b).
39. *See* FED. R. EVID. 611(b).
40. S.C. R. EVID. 611(c).
41. *Id.* 612.
42. *Id.* 612(2).

deleted portion for appeal.[43] In a criminal case, if the writing is not produced, the court may strike the testimony or declare a mistrial.[44]

A standard question should be whether the witness has reviewed or is reviewing a writing to refresh his memory. That writing may contain devastating information for the purpose of cross-examination. A writing, the date of its making, who wrote it, and when it was used to refresh the witness's memory should be identified. Any deviations between the witness's testimony and the writing should be emphasized through cross-examination and then, if possible, through introduction into evidence.

I. Rule 613

Rule 613, which allows examination of a witness's prior statements,[45] is perhaps the single most effective method of cross-examining a witness. A prior inconsistent statement questions the credibility, motive, bias, or prejudice of a witness and the factual foundation of the testimony.

In South Carolina the examination of a witness about a statement is subject to the provisions of the South Carolina Code.[46] Section 19-1-80 requires lawyers first to show the witness an exact copy of the statement and give him reasonable time to read it.[47] If the witness has made a prior inconsistent statement and does not admit that he made the prior inconsistent statement, extrinsic evidence of the statement is admissible provided "the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement."[48] Conversely, if the witness admits making the prior inconsistent statement, extrinsic evidence is not admissible because the witness has been impeached.[49]

When seeking to impeach by a prior inconsistent statement, you should reaffirm the present testimony so that the witness cannot later claim a lack of understanding or confusion. The following is an example:

> "Mr. Jones, you have testified that John Hill did not have a pistol."
> "Mr. Jones, did you give a statement on July 9, 1996 at the Columbia Police Department to Sergeant Smith?" (You may show the statement to the witness.)
> "Did you tell Sergeant Smith at that time that John Hill had

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43. *Id.*
44. *Id.*
45. *Id.* 613.
46. *See* S.C. CODE ANN. §§ 19-1-80 to -100 (Law. Co-op. 1976 & Supp. 1998) (discussing written statements made to public employees).
47. S.C. CODE ANN. § 19-1-80 (Law. Co-op. 1976).
48. S.C. R. EVID. 613(b).
49. *Id.* This provision does not apply to the admission of a party-opponent as defined in Rule 801(d)(2). *Id.*

a pistol?" (Read excerpt verbatim or have the witness read it.)
"Do you deny making the statement?"

If the witness admits the prior inconsistent statement, the inquiry ends. However, if the witness denies the prior inconsistent statement, you may seek to introduce the relevant part of the statement, the entire statement, or the testimony of the person to whom the statement was made.

Several caveats are important here. You may "open the door" for other relevant portions of the witness's statement to come into evidence, or the adverse party may attempt to offer evidence of a prior consistent statement. As with everything you do in a case, you must balance the risk. Go ahead if the risk is worth taking, and try to keep out any other portions of the statement or prior consistent statements.

J. Rule 803

A thorough knowledge of Rule 803, the hearsay exceptions rule, is essential to effective cross-examination. There are twenty-two areas of inquiry covered under the Rule that are not excluded by the hearsay Rule, even though the declarant is available as a witness.

When preparing cross-examination and when actually conducting a cross-examination, consider questioning witnesses as to the following: present sense impressions of a declarant;[50] excited utterances of a declarant;[51] the declarant's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)";[52] the declarant's "[s]tatements made for purposes of medical diagnosis or treatment";[53] recorded recollection as to a memorandum or records;[54] records of regularly conducted activity and the absence of an entry in those records;[55] public records and reports;[56] various records relating to vital statistics, family, property, and commercial publications;[57] an expert witness as to statements in learned treatises;[58] reputation;[59] and judgments such as prior convictions or proof of family or general history if provable by general reputation.[60]

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50. *Id.* 803(1).
51. *Id.* 803(2).
52. *Id.* 803(3)
53. *Id.* 803(4).
54. *Id.* 803(5).
55. *Id.* 803(6), (7).
56. *Id.* 803(8).
57. *Id.* 803(9)-(17).
58. *Id.* 803(18).
59. *Id.* 803(19)-(21).
60. *Id.* 803(22), (23).

K. Rule 804

Rule 804, which applies when the declarant is unavailable,[61] is especially important for cross-examination. The former testimony of an unavailable witness may be admissible "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[62]

Rule 804(b)(3) allows statements against a declarant's interest to be admissible if the statement subjected the declarant to criminal liability and "a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[63] However, "a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[64]

Rule 804 is important because an unavailable witness is defined in part as one who "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement."[65] If a declarant has made a favorable statement, but now asserts the Fifth Amendment, consider utilizing the Rule in the cross-examination of a person to whom the statement was made. The court will, of course, require a showing of unavailability (perhaps calling the witness to assert the privilege) and the other requirements of the Rule as to corroboration, such as physical evidence or known facts, or even the testimony of another.

L. Rule 806

Rule 806 is important with regard to hearsay and cross-examination. The adoption of this Rule is a departure from South Carolina practice. If a "hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked"[66] by any evidence admissible for those purposes just as if the declarant had testified as a witness. Any evidence that the declarant at a previous time made a statement or displayed conduct inconsistent with the hearsay statement is admissible and not subject to the Rule 613 requirement that the declarant be afforded an opportunity to deny or explain this evidence. If a hearsay statement has been admitted against your client, you may call the declarant and examine the declarant under cross-examination.

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61. *Id.* 804.
62. *Id.* 804(b)(1).
63. *Id.* 804(b)(3).
64. *Id.*
65. *Id.* 804(a)(1).
66. *Id.* 806.

M. Rules 901 and 902

Rule 901 governs authentication or identification and is just as important to the cross-examiner as it is to the direct examiner. During cross-examination authentication is a condition precedent to admissibility.[67] Review the Rule, including its illustrations,[68] as a guide. Furthermore, Rule 902 sets forth ten categories for which extrinsic evidence is not required as a condition precedent for admissibility.[69]

N. Rule 1007

During cross-examination, keep in mind that under Rule 1007 the "[c]ontents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original."[70] This can be especially important when you do not have the original document but need to use the document for cross-examination.

XVII. SPECIFIC WITNESSES

A. Experts

Before cross-examining an expert witness, have command of the subject matter and remember that you will never have the expertise in the area that the witness has. You should respect her knowledge or face possible devastating consequences.

In preparing to examine an expert witness, read as much as you can about the subject. Technical detail may become hard to manage, difficult to ask questions about, and more difficult to respond to if the witness is answering effectively. Study the area you seek to cover so that you will have, at a minimum, a good working knowledge and will be able to formulate meaningful questions.

Study the expert's report. Take the report and hire an expert so that you will have a skilled person to study the report and advise you of its flaws. In almost every homicide case that I have tried, I have consulted a forensic pathologist to help me prepare for the cross-examination. This is not done solely for the purpose of undermining the expert's ultimate conclusion, but is also for asking the witness questions under cross-examination that will bring out favorable facts, such as the effects of the victim's blood alcohol content.

Visit the library and research whether the witness has ever published on the

67. *Id.* 901.
68. *See id.* 901(b).
69. *Id.* 902.
70. *Id.* 1007.

specific area about which she will testify. People change positions over the years. I have seen many witnesses squirm over a decade-old conclusion that they no longer wish to adopt.

Interview the expert if possible. Do not incidentally prepare the witness by giving away your key questions. Size up the expert as to her knowledge, experience, confidence, appearance, and delivery. After the interview, go back to your expert again and review the fruits of your interview.

At the time of the testimony, consider whether you wish to *voir dire* an expert that is obviously qualified. Doing so may only enhance her image. Stipulate to her qualifications if it is obvious the expert is and will be qualified by the court. In making this decision, remember that the expert may be qualified in one area, but not necessarily in the area proposed. While you may stipulate to a broad area, you would want to object to qualification in a more specialized area if that is the real issue.

In the cross-examination of an expert, attack the foundation upon which she relies. Did she consider everything that she should? The goal is to call into question the expert's conclusion by pointing to important issues that she ignored or was not told about. The more information the expert fails to consider, the better the reasonable doubt argument is, even if the expert stands firm on the conclusion. Moreover, if the expert relied on incorrect facts, emphasize the importance of those facts. Again, even if the expert does not budge, you can undermine the strength of her opinion.

During the cross-examination, emphasize those facts which, even if considered by the expert, favorably support another possible conclusion. For example, in the examination of a forensic pathologist who is testifying about the angle of a bullet wound, emphasize that another wound may support a more favorable angle for your position.

Question the expert concerning facts which support another, more favorable opinion. For example, in a homicide case, if evidence supports the expert's damaging conclusion that the wound was caused by a relatively close gunshot, point out that the close gunshot wound, taken together with the angle of entry, supports what later will be developed as the defendant's version of self-defense. In other words, you must keep searching for facts that undermine the expert's conclusion, question the conclusion, or support another conclusion.

When an expert testifies to an issue involving multiple components, try to explore how those components could also support another theory. For example, example when a psychiatrist testifies about the seven criteria that support a particular mental diagnosis, attempt to demonstrate that those traits, plus or minus one, may also support a more favorable diagnosis.

You should also carefully explore the process employed by the expert. Did she perform the best test? Did she do other tests? Were the controls suitable? Could they have been better? How much time did she spend in testing or conducting the interviews? What was the witness told which may be correct, somewhat correct, or totally incorrect? Did the information conveyed to the expert create a bias, or does the witness in fact already have a bias?

Experts can be cross-examined just like any other witness as to motive, interest, bias, or prejudice. Who pays the expert? Is she on the state's payroll? Who normally utilizes the expert? Has she ever testified for your side? Has the expert had a life experience that creates the bias? Was the expert or someone close to her the victim of similar conduct? Does she have religious or moral beliefs that would taint the conclusion?

B. Law Enforcement Witnesses

Investigators and other law enforcement officials have an interest in their cases. No one in law enforcement wants to work a case, present it in court, and then lose. Accordingly, law enforcement witnesses can be dangerous. Not only are they advocates of their position, they are also experienced witnesses. They are waiting for you.

In preparation for the cross-examination of a law enforcement official, catalogue every writing, note, or statement made by the witness. Examine the witness about inconsistencies and omissions in the documents and inconsistencies between the documents and other known facts. Question the witness about the failure to follow, develop, or abandon leads. Question observations and conclusions. Point out what was done, what was not done, and what should have been done.

Explore motive, interest, bias, and prejudice. This will, of course, require thorough knowledge of the witness. Talk to other lawyers who have confronted the witness and may have information about the witness and his style. Does the witness have a background that creates bias? Has the witness been investigated, reprimanded, or disciplined?

When cross-examining a law enforcement witness, keep every statement made to that witness with his file. When the witness is offered for cross-examination, extract from the witness contradictions or prior inconsistent statements of witnesses he may have interviewed. Never make it an easy ride for the opposition.

When cross-examining a law enforcement officer, do not rehash the unfavorable facts. Instead, develop the favorable facts. For instance in a driving under the influence case, the officer testifies that the defendant had slurred speech, bloodshot eyes, and an odor of alcohol. His conclusion is that the defendant was under the influence. Rather than go back and question his observations and conclusions, point out facts showing that the defendant was not under the influence. For example, emphasize that the defendant stopped promptly, pulled off the road correctly, produced his drivers license and registration, or walked without assistance. Get the witness to commit both that these and other observations are what he is trained to look for when determining whether someone is under the influence and that their absence supports the defendant's position that he was not under the influence.

Law enforcement officers should be sequestered. While the State is probably entitled to the case agent, move to exclude the rest—the case agent,

too, if possible. Explore and note every inconsistency between the statements of the agents or officers regarding what was said, seen, and done. Often witnesses will differ about what they heard, saw, or did. While they all may be telling the truth, variances are fertile ground for creating a reasonable doubt.

C. The Accomplice

The cross-examiner must show that the accomplice is lying. Other witnesses may have an opinion or reach an incorrect conclusion, but the accomplice is putting culpability right on the defendant and, according to your position, cannot be telling the truth about your client.

You should plan the cross-examination of the accomplice or informant in advance, but you must pay attention to the actual testimony. Obtain every statement and every note by anyone concerning what the witness previously said. Interview those people to find out what the accomplice said, when he said it, what he changed, and what he omitted. Develop the examination to maximize the effect and benefit of every inconsistency, error, or omission. Point out what this witness has said and show how this contradicts what another witness has said or what the physical or forensic evidence does not support.

What benefit is the witness getting from the testimony, and when did he get it? What was the witness looking at as a sentence? Was there any payment? Was dropping some or all of the charges a possibility? Did he face placement in a particular prison? Were there any concessions in the State's position in the presentence report? What is the witness's understanding of the deal? Explore the timing of and the exact form of any concession to show the witness's motive for testifying.

Know the witness's prior record of convictions and prior experience with making deals—the more cunning, conniving, and experienced you can demonstrate the witness to be, the better the attack on credibility and believability.

Develop the amount of time that the witness spent preparing with the law enforcement officials and the prosecutor. How long did they spend together? What were the circumstances? What was he told others had said? What discovery did he have access to? What else did he read? Was he taken anywhere? Did his story develop on his own, or with assistance? How many times did they meet? Was he ever told his story did not support that of another witness or that another witness contradicted him? How did they prepare him? Did they bring him into the courtroom and question him on the stand?

Very few accomplices testify looking the way they looked when they were arrested. They usually clean up. Secure a picture of the witness during the events or at the time of arrest. While the prosecution may want to make the witness attractive, your goal is to make him less attractive and less believable. If the prosecutor calls him Richard, you call him Mr. Smith. Always remember to convey to the jury that if the witness was not on that witness stand as a *State*

witness, he would be sitting at the defense table with you and your client. If that was the case, the prosecutor would be pointing at the accomplice and telling the jury that he is guilty and not worthy of belief.

D. The Lay Witness

Preparation for a lay witness is no different than preparation for any other witness. Gather all the information you can about the witness such as records, statements, background, and other vital information. Evaluate the witness in advance of trial as to how the witness can hurt and help. Try to interview the witness if it will not give away a strategy or take away the element of surprise.

Explore issues that relate to bias, motive, or prejudice, such as relationship to the parties or a stake in the outcome. Pursue areas of impeachment, such as prior inconsistent statements and criminal convictions. Point out what the witness did and did not do, say, or observe. If possible show how the witness's testimony supports your witnesses and your theory and how the witness may contradict the other side's witnesses and theory. Point out every issue that is inconsistent with other witnesses' testimony or with the physical and scientific facts.

Evaluate whether a lay witness is a perjurer or a witness that has come to an erroneous conclusion based upon a mistaken set of facts. Maybe the witness thought he heard something else. Maybe the witness was not in a position to hear anything at all. The same can be said for observations made by the witness. Is the witness mistaken because of an inability to see clearly an event, such as poor lighting, or is the witness simply not telling the truth? In the case of the former, try to correct the situation. Guide the cross-examination in a direction that brings out the flaws upon which the conclusion or assumption is based. If the witness is truly lying, you must catch the witness off guard, skip around in the examination, and keep the witness off the prepared script. Stay with the witness and be persistent. Probe for the weak points in the testimony, find them, and make the most of them, whether they are inconsistent statements or erroneous conclusions. As much as you can, put the witness in a posture that contradicts other witnesses and the physical or scientific facts.

XIX. RELEVANT CASE LAW

A. Confrontation

The right to "[c]onfrontation means more than being allowed to confront the witness physically";[71] the primary interest secured is the right to cross-examine.[72] The Sixth Amendment rights to notice, confrontation, and

71. Davis v. Alaska, 415 U.S. 308, 315 (1974).
72. *Id.*

compulsory process guarantee that a defendant may answer a criminal charge through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.[73] The right to cross-examine a prosecuting witness is of constitutional dimensions, being essential to a fair trial, guaranteed by both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

A defendant shows "a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'"[74]

"Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias."[75] An appellate court normally will not disturb a trial court's ruling concerning the scope of cross-examination absent a manifest abuse of discretion. "The trial judge retains discretion 'to impose reasonable limits on [the scope] of cross-examination.'"[76] However, the right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser. "[B]efore a criminal defendant can be prohibited from engaging in cross-examination designed to show 'a prototypical form of bias on the part of a witness,' the record must clearly show that the cross-examination is somehow inappropriate."[77] When there is nothing to indicate that the attempted cross-examination was improper, the defendant's Sixth Amendment rights were violated.

For example in *State v. Graham*, Graham argued that the trial court violated his Sixth Amendment right of confrontation when the court prohibited him from impeaching the State's witness by bringing to the jury's attention the witness's eight-year sentence for his involvement in the murder.[78] The South Carolina Supreme Court agreed and found reversible error.[79]

In *State v. Holmes*[80] the trial court erred in refusing to allow the defendant to impeach a prosecution witness with the witness's prior conviction for violation of a "Peeping Tom" statute, but the supreme court found the error harmless.[81]

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73. *See id.* at 316.

74. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (quoting *Davis*, 415 U.S. at 318).

75. State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

76. State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (quoting *Van Arsdall*, 475 U.S. at 679).

77. *Id.* at 385-86, 444 S.E.2d at 527 (quoting *Van Arsdall*, 475 U.S. at 680) (citation omitted).

78. *Id.* at 385, 444 S.E.2d at 527.

79. *Id.* at 387, 444 S.E.2d at 528.

80. 320 S.C. 259, 464 S.E.2d 334 (1995).

81. *Id.* at 266, 464 S.E.2d at 338.

In *State v. Clark*[82] Clark moved for permission to cross-examine the State's witness regarding a murder indictment pending against the witness.[83] Clark contended that the witness was likely to be biased toward the State in the hope of favorable treatment on his pending charges. The solicitor responded that the witness was testifying under subpoena and that there was no agreement regarding the pending charge. The trial judge ruled that the appellant could not cross-examine about the pending murder charge. The supreme court found that the cross-examination was improperly precluded, but that the error was harmless.[84]

In *State v. Smith*[85] Smith attempted to impeach the State's witness with pending charges of possession with intent to distribute crack cocaine and possession with intent to distribute within a half mile of a school despite the fact that the judge had previously denied the admission of this evidence.[86] The trial judge instructed the jury to disregard counsel's question and informed the jury that there were no charges pending against the witness. Although the trial court erred in denying Smith the opportunity to cross-examine regarding the pending charges, the error was found to be harmless beyond a reasonable doubt.[87]

In *State v. Cooper*[88] Cooper argued that the trial judge erred in refusing to permit him to cross-examine the State's witness regarding his involvement in a conspiracy to smuggle drugs.[89] The court agreed that the judge's ruling was error, but found that the error was harmless: "Error in excluding evidence of a witness'[s] prior bad acts is harmless where the witness is thoroughly impeached by admission of numerous previous convictions and acknowledges his testimony is given in exchange for favorable treatment on pending charges."[90]

B. Harmless Error Analysis

Absent a manifest abuse of discretion an appellate court will not disturb a trial judge's ruling concerning the scope of the cross-examination of a witness

82. 315 S.C. 478, 445 S.E.2d 633 (1994).
83. *Id.* at 480, 445 S.E.2d at 634.
84. *Id.* at 482, 445 S.E.2d at 635.
85. 315 S.C. 547, 446 S.E.2d 411 (1994).
86. *Id.* at 551, 446 S.E.2d at 413.
87. *Id.* at 553, 446 S.E.2d at 414.
88. 312 S.C. 90, 439 S.E.2d 276 (1994).
89. *Id.* at 91, 439 S.E.2d at 277.
90. *Id.* at 92, 439 S.E.2d at 277. *But see* State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (finding the fact that the State's witness was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to be critical evidence of potential bias which appellant should have been permitted to present to the jury).

to test his credibility or to show possible bias or self-interest in testifying.[91]

> A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error.
>
> "Whether such an error is harmless in a particular case depends upon a host of factors. . . . The factors include the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."[92]

"While the harmless error ruling in *Van Arsdall* dealt specifically with witness bias, . . . the *Van Arsdall* factors apply with equal force in determining a harmless error violation relating to any issue of witness credibility."[93]

C. Scope of Cross-Examination

A trial court has broad discretion in determining the general range and extent of cross-examination.[94] "More latitude is allowed on cross[-]examination than on direct examination[,] and the scope of the examination is largely discretionary."[95] This latitude in the area of credibility extends to cross-examination allowing testing the accuracy of a witness's memory, bias, prejudice, or interest. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."[96] "On cross-examination, a witness may be asked questions in reference to irrelevant matter, in reference to prior statements contradictory of testimony, or in reference to statements concerning relevant matter not contradictory of testimony."[97]

A trial judge may impose reasonable limits on cross-examination to prevent harassment, prejudice, confusion of the issues, threats to witness safety,

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91. *See* State v. Smith, 315 S.C. 547, 551, 446 S.E.2d 411, 413 (1994); State v. Sprouse, 325 S.C. 275, 279, 478 S.E.2d 871, 874 (Ct. App. 1996).

92. State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

93. State v. Holmes, 320 S.C. 259, 265, 464 S.E.2d 334, 337 (1995) (citing State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

94. *See, e.g.*, State v. Tyner, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979) (upholding the trial court's discretionary rulings).

95. State v. Plath, 277 S.C. 126, 141, 284 S.E.2d 221, 229 (1981), *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998).

96. S.C. R. EVID. 611(b).

97. State v. Jenkins, ___ S.C. ___, 474 S.E.2d 812, 814 (Ct. App. 1996), *cert. granted*, ___ S.C. ___ (1997).

irrelevance, and repetitive inquiries.[98]

D. The Accused As a Witness

When an accused takes the witness stand, he becomes subject to impeachment like any other witness. Regardless of whether the accused offers evidence of his good character, an accused who takes the stand may be cross-examined about past transactions tending to affect his credibility. The accused may be asked about prior bad acts that are not the subject of conviction which go to his credibility. "If the accused denies the prior misconduct, the [s]tate must accept the answer."[99] Where the defendant has admitted prior convictions and the prosecutor seeks additional information regarding the convictions, "the cross examination should be restricted to the fact of such convictions, and the details of the earlier criminal conduct should not be explored by the prosecutor."[100] Furthermore, "evidence of prior transactions is admissible only when necessary to prove a fact in issue."[101]

When a defendant chooses not to exercise his right to remain silent, gives a statement before trial, and then testifies to a different version of his involvement in the offense at trial, he may be cross-examined regarding the inconsistency. Inconsistent descriptions of events may be said to involve "silence" insofar as they omit facts included in other statements. Cross-examination at that point does not make unfair use of silence, but merely inquires into prior inconsistent statements occasioned by the defendant not remaining silent.[102]

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98. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

99. State v. China, 312 S.C. 335, 339, 440 S.E.2d 382, 384 (Ct. App. 1993); *see also* State v. Major, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990) ("The cross-examiner must take the accused's answer concerning th[e] alleged acts, . . . and if the accused denies them, he may not be contradicted.").

100. United States v. Smith, 353 F.2d 166, 168 (4th Cir. 1965). But see S.C. R. EVID. 608(b), which states:

> Specific instances of the conduct of a witness . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness'[s] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

101. State v. Bright, 323 S.C. 221, 225, 473 S.E.2d 851, 853 (Ct. App. 1996) (per curiam).

102. *See* State v. Kimsey, 320 S.C. 344, 346, 465 S.E.2d 128, 130 (Ct. App. 1995) (holding that the prosecution properly asked the accused on cross-examination why he did not tell authorities about certain details of his trial testimony when he gave pretrial statements to the police.)

E. Other Witnesses

A lawyer may have several reasons to cross-examine other witnesses. For example, a lawyer may properly cross-examine the defendant's character witness as to whether he associated with several known drug dealers and may offer evidence to test the witness's assessment of the defendant's character.[103] Where a witness has been impeached by evidence that he made a prior inconsistent statement, the court will allow proof that the witness made a prior consistent statement, provided that the witness made the prior consistent statement before the witness's relation to the cause.[104]

The State may cross-examine a defense witness with regard to the failure to come forward with information that would allegedly have exculpated the defendant. In such a case, the proper ground upon which to impeach a witness's testimony is credibility.[105]

A defendant has a right to cross-examine a co-defendant only if the co-defendant's testimony was incriminatory. "The Confrontation Clause provides the defendant with a right 'to be confronted with the witnesses *against him*.'"[106]

Evidence of prior false accusations by a victim may be probative on the issue of credibility. When admissibility of evidence of a victim's prior accusation is an issue, "the trial judge should first determine whether such accusation was false. If the prior allegation was false, the next consideration becomes remoteness in time. Finally, the trial court shall consider the factual similarity between prior and present allegations to determine relevancy."[107]

Counsel must have a good faith basis for questions asked on cross-examination. "Although counsel may explore certain areas of inquiry in a criminal trial without full knowledge of the answer to anticipated questions, he must, when confronted with a demand for an offer of proof, provide some good faith basis for questioning that alleges adverse facts."[108] In seeking to impeach a witness, "[c]ounsel should not be permitted to go on a fishing expedition in hopes of finding some misconduct."[109] Where the question has no basis in fact,

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103. *See* State v. Barroso, 320 S.C. 1, 25-26, 462 S.E.2d 862, 877-78 (Ct. App. 1995).

104. *See* Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994).

105. *See* State v. Nathari, 303 S.C. 188, 195, 399 S.E.2d 597, 602 (Ct. App. 1990) (per curiam).

106. United States v. Crockett, 813 F.2d 1310, 1313 (4th Cir. 1987).

107. State v. Boiter, 302 S.C. 381, 383-84, 396 S.E.2d 364, 365 (1990); State v. Sprouse, 325 S.C. 275, 279, 478 S.E.2d 871, 874 (Ct. App. 1996) (holding that where there was no evidence that the victim ever made a prior false allegation of sexual abuse, the judge properly ruled that the defense could not pursue that line of questioning).

108. United States v. Katsougrakis, 715 F.2d 769, 779 (2d Cir. 1983).

109. State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979) (per curiam). "[I]f a party has obtained a final ruling on the admissibility of impeachment evidence, that party does not lose his right to challenge on appeal the admissibility of the evidence by eliciting the evidence during direct examination." State v. Mueller, 319 S.C. 266, 269, 460 S.E.2d 409, 411 (Ct. App. 1995).

merely asking the question may be prejudicial.[110]

F. Pitting

"'It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness. This error is reversible if the accused is unfairly prejudiced thereby.'"[111] In *State v. Bryant*[112] improper questioning pitted an officer's testimony against the defendant's. The defendant's credibility was critical because he and the officer were the only witnesses present during the incident. The court found that the defendant was unfairly prejudiced by the improper cross-examination.[113]

G. Confronting Child Witnesses

The right to face-to-face confrontation is not absolute. It can be dispensed with if "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[114]

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.[115]

The finding of necessity must be case specific. The trial judge must hear evidence and determine whether the special procedure "is necessary to protect the welfare of the particular child witness."[116]

> The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . [T]he trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimus* . . . .[117]

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110. *See McGuire*, 272 S.C. at 550, 253 S.E.2d at 104.

111. State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (quoting State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988)).

112. *Id.* at 216, 447 S.E.2d at 852.

113. *Id.* at 221, 447 S.E.2d at 855.

114. Maryland v. Craig, 497 U.S. 836, 850 (1990).

115. *Id.* at 855.

116. *Id.*

117. *Id.* at 856.

In making the case-specific determination of necessity, "the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child."[118] Although a number of opinions have addressed the question, there is no bright-line test for the level of evidentiary support needed for a determination of necessity.

Evidence from a treating psychologist and a personal interview with the child have been held sufficient.[119] Conversely, a judge's general remarks about children feeling uncomfortable testifying in open court has been held insufficient,[120] and the judge's reliance on the solicitor's assertions rather than making personal observations was insufficient. No South Carolina case has found that the State met its burden by relying solely on the child's testimony.[121] In *State v. Lewis* the South Carolina Court of Appeals found that where the trial court's finding that it was necessary to have the child testify outside the defendant's presence was without evidentiary support, the defendant's Sixth Amendment Confrontation Clause rights were violated.[122]

XX. CONCLUSION

Cross-examination can be very helpful, but it can also be very devastating. Cross-examination can be very fulfilling, but it can also be very damaging. It is important to know how to cross-examine, but it is just as important to know when not to cross-examine. All trial lawyers agree that once the point has been made, stop. The key to a successful cross-examination is when to sit down. My favorite example of this was discussed in law school many years ago, but it still classically illustrates the point:

> Q. And so Mr. Smith, you did not see the fight or see my client bite off the ear of Mr. Jones. Isn't that true?
> A. That is correct.
> Q. So, Mr. Smith, if you did not see the fight and did not see my client bite off the ear of Mr. Jones, how can you tell this jury that my client bit off Mr. Jones's ear?
> A. Because I saw him spit it out!

Do not lose your case on cross-examination!

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118. State v. Murrell, 302 S.C. 77, 80-81, 393 S.E.2d 919, 921 (1990).

119. *See, e.g.*, State v. Lopez, 306 S.C. 362, 366, 412 S.E.2d 390, 392-93 (1991); Starnes v. State, 307 S.C. 247, 251, 414 S.E.2d 582, 584 (1991); State v. West, 313 S.C. 426, 427, 429, 438 S.E.2d 256, 257, 258 (Ct. App. 1993).

120. *See* State v. Rogers, 293 S.C. 505, 508, 362 S.E.2d 7, 9 (1987).

121. *See* State v. Lewis, 324 S.C. 539, 548, 478 S.E.2d 861, 866 (Ct. App. 1996) (per curiam).

122. *Id.* at 550, 478 S.E.2d at 867.